

ASH v. OSHA

April 1, 1994

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I. SUMMARY

- Action on Smoking and Health (ASH) has tried for more than seven years to force OSHA into a federal rulemaking that would ban or severely restrict workplace indoor smoking. Up to this point, ASH's court challenges have been unsuccessful, although ASH now claims responsibility for forcing OSHA to initiate proposed rulemaking on indoor smoking (see attached).
- In the pending lawsuit ASH v. OSHA, filed December 22, 1992, ASH seeks to force OSHA to segregate ETS from the larger issue of IAQ and devote a regulation solely to workplace smoking. The parties have exchanged their briefs on the merits; the remainder of the briefing schedule is as follows:

April 1, 1994	ASH's Reply Due
April 8, 1994	Deferred Appendix
April 22, 1994	Final Briefs
May 16, 1994	Oral Argument

- ASH has also mailed solicitations (see attached) seeking financial support for its effort at OSHA, and for other possible litigation.
- On March 25, 1994, ASH issued a press release (see attached) to claim responsibility for OSHA's announcement of a proposed

rulemaking on IAQ and ETS. ASH states that its lawsuit has been successful, but that it will continue to use the litigation to pressure OSHA move expeditiously in imposing a total ban on smoking in the workplace.

II. POSSIBLE IMPACT OF ASH ACTIONS

- ASH may use OSHA and the issue of workplace smoking as an ongoing vehicle to raise money to finance various types of other litigation. Lawsuits brought on behalf of ETS exposed children is one example cited by ASH.
- ASH could eventually be successful in its pending lawsuit, resulting in a possible court mandate for OSHA to take certain court-directed actions regarding possible regulation of indoor smoking.

III. BACKGROUND

- ASH has sued OSHA in the U.S. Court of Appeals for the District of Columbia four times. The first three cases, filed in 1989 and 1991, were dismissed. Each case is summarized individually in the Sections below.

- The fourth case, filed in December 1992, is pending. It is summarized in Section VII below.
- In addition to the December 1992 lawsuit, three of the petitions ASH has filed with OSHA apparently remain pending. They are summarized in Section VIII below. ASH most recently petitioned OSHA on July 12, 1993; the petition asks OSHA to issue an emergency temporary standard banning smoking in the workplace.
- For ease of reference, Section IX briefly discusses IAQ-related petitions filed with OSHA by individuals and entities other than ASH.

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IV. EVENTS RELATING TO CASE NO. 89-1656 (DISMISSED MAY 10, 1991)

- A. May 19, 1987 -- ASH petitions OSHA for an emergency temporary standard to prohibit or restrict smoking in common indoor workplace areas.
- B. September 1, 1989 -- OSHA determines "that an emergency temporary standard is not warranted in this case."

- C. October 27, 1989 -- ASH files Case No. 89-1656, seeking review of OSHA's decision not to issue an emergency temporary standard.
- D. November 30, 1990 -- After an agreed, five-month period of abeyance in the case, OSHA informs ASH by letter that it is not prepared to initiate rulemaking on ETS, "although a final decision on whether, and how, to proceed has not been reached."
- E. December 14, 1990 -- OSHA files a status report in Case No. 89-1656 stating that it intends to issue a request for information on indoor air in the spring of 1991.
- F. May 6, 1991 -- The court hears oral argument on the Petition for Review. A Department of Labor attorney arguing on behalf of OSHA states that ASH's evidence "does not purport to estimate or quantify the magnitude of risk in the workplace" and that "more accurate estimates to exposure in the workplace, in the home and in public places is necessary in this area." Transcript, p. 16.
- G. May 10, 1991 -- D.C. Circuit dismisses case. "Substantially for the reasons stated in the OSHA's

decision letter of September 1, 1989, we believe that the OSHA reasonably determined that it could not at this time sufficiently quantify the degree of risk associated with workplace exposure to ambient tobacco smoke to justify issuing an [emergency temporary standard.]"

V. **EVENTS RELATING TO CASE NO. 91-1037 (DISMISSED JANUARY 29, 1992)**

- A. December 14, 1990 -- OSHA files a status report in Case No. 89-1656, stating that the agency "has decided to issue a Request for Information on indoor air quality problems, including any related to [ETS]."
- B. January 23, 1991 -- ASH files Case No. 91-1037, seeking review of OSHA's decision to include ETS in the Request for Information on indoor air quality. ASH alleges that OSHA's plan would "trivialize the tobacco menace." ASH prays for an order setting aside the decision to issue an RFI and remanding the proceeding to OSHA "for issuance of a Notice of Proposed Rulemaking to establish an emergency or permanent standard for control of [ETS] in the workplace."

C. January 29, 1992 -- Court grants defendants' motions to dismiss in an order issued jointly in Case Nos. 91-1037 and 91-1038.

1. "Neither the November 30, 1990, letter from the Occupational Safety and Health Administration ('OSHA') to petitioner, nor the December 14, 1991 [sic], OSHA status report filed in No. 89-1656, represents final agency action relating to the regulation of tobacco smoke in the workplace."
2. "We are satisfied by OSHA's representation that it will decide whether and how to regulate exposure to tobacco smoke in the workplace as soon as possible following analysis of the comments it receives in response to the [RFI]."
3. "This order is without prejudice to renewal of petitioner's request in the event that OSHA unreasonably delays resolution of this matter following receipt of comments."

VI. EVENTS RELATING TO CASE NO. 91-1038 (DISMISSED JANUARY 29, 1992)

- A. November 30, 1990 -- In the context of Case No. 89-1656 (see above), OSHA Administrator Gerard F. Scannell writes letter to OSHA, stating that "OSHA is not prepared, at the present time, to initiate rulemaking on ETS, although a final decision whether, and how, to proceed has not been reached.
- B. January 23, 1991 -- ASH files Case No. 91-1038, seeking review of OSHA's position as represented by the November 30 letter. "OSHA appears . . . to have disregarded the substantial evidence in the record considered as a whole, once more postponed making a final decision and thereby unlawfully withheld and unreasonably delayed agency action," ASH alleges. ASH prays that the November 30 determination be set aside and that the proceeding be remanded to OSHA "for immediate commencement of a rulemaking proceeding to establish an emergency temporary, or permanent standard for control of [ETS] in the workplace."
- C. January 29, 1992 -- Court grants defendants' motions to dismiss in an order issued jointly in Case Nos. 91-1037 and 91-1038. See Section II.C above.

VII. EVENTS RELATING TO CASE NO. 92-1661 (FILED DECEMBER 22, 1992; PENDING)

- A. July 31, 1992 -- ASH petitions OSHA (1) to regulate ETS as a potential occupational carcinogen pursuant to the OSHA Cancer Policy and (2) to isolate ETS from the ongoing examination of overall indoor air quality.
- B. October 30, 1992 -- In a letter to ASH, Acting OSHA Director Dorothy Strunk refuses to isolate ETS from the ongoing examination of overall indoor air quality and to take immediate steps to regulate ETS as a potential occupational carcinogen.
- C. December 22, 1992 -- ASH files Case No. 92-1661, seeking review of the determinations reflected in the October 30 letter. ASH prays for an order setting aside both determinations, remanding the matter to OSHA for further consideration of ASH's petition, and setting a timetable for OSHA to regulate ETS in the workplace.
- D. January 13, 1993 -- In a public announcement not attributed to the ASH litigation, outgoing Labor Secretary Lynn Martin directs OSHA "to commence rulemaking to address the hazards of occupational exposure to secondhand smoke."

- E. May 20, 1993 -- The court denies OSHA's motion to dismiss, finding that the October 30, 1992, letter "meets the criteria of a final, reviewable order," grants ASH's motion to hold the case in abeyance for 60 days (based on former Secretary Martin's January 1993 directive), and orders the parties to file motions to govern further proceedings at the end of the 60-day period.
- F. July 19, 1993 -- Both sides file separate motions to govern proceedings. ASH seeks an immediate briefing and argument schedule, while OSHA seeks a continuation of the order holding the case in abeyance. OSHA says Labor Secretary Robert Reich has not yet made a decision about regulating ETS and cannot say "when he will decide whether or how to regulate occupational exposure to tobacco smoke." OSHA suggests that an initial status report be filed in 90 days.
- G. September 15, 1993 -- Court grants ASH's motion to proceed with briefing and oral argument while denying OSHA's motion to hold the case in abeyance.
- H. February 9, 1994 -- ASH files its brief on the merits of its petition for review. In its brief, ASH alleges that it first sought OSHA regulation of ETS in the workplace

more than 18 years ago and argues that OSHA's refusal to take "concrete action" on the issue during that time constitutes "unreasonable, illegal, and egregious delay," particularly in light of "the scientific certainty of the danger and the huge number of workers exposed."

ASH also argues that OSHA's failure to consider ETS in a rulemaking separate from IAQ issues in general and OSHA's "failure to make a separate determination regarding its carcinogenicity" is arbitrary and capricious and a violation of OSHA's own regulations and Cancer Policy. ASH refers to OSHA's request for information on indoor air as a "lumping" of ETS with a "wide variety of other very different, largely unstudied, and not very dangerous substances."

Finally, ASH argues that "the Court should retain jurisdiction over this matter and utilize techniques it used in prior OSHA and other cases of delay, and order OSHA to: (A) publish a separate notice of proposed rulemaking devoted solely to ETS within thirty (30) days of the Court's order; (B) establish -- subject to the Court's approval -- a strict timetable based upon OSHA's own regulations for conducting and completing the rulemaking; (C) require OSHA to notify the Court

immediately of any proposed change of plan or of any event which might cause any deviation from the timetable."

ASH cites the ETS risk assessment in its brief and characterizes the document as "a leading authority today on the health risks of ETS." The EPA is characterized by ASH as having "primary expertise in estimating the number of deaths caused by exposure to airborne carcinogens."

- I. March 21, 1994 -- OSHA files its brief opposing ASH's petition for review. OSHA claims that its Cancer Policy "does not require the immediate initiation of rulemaking on any particular alleged carcinogen, and it does not prohibit OSHA from regulating a carcinogen in the same rulemaking proceeding as other noncarcinogenic hazards." OSHA further claims that there is no basis for ASH's claim that OSHA has unreasonably delayed initiating a rulemaking addressing ETS.

According to OSHA, "The subject matter of the proceeding is highly controversial and the Secretary has properly chosen to consider carefully all regulatory options and the extensive body of information already submitted to the agency." OSHA also points out that it has taken

"concrete administrative actions" to complete the rulemaking, and thus, ASH's claims of delay are moot. (At the time OSHA filed its brief, it had submitted its rulemaking proposal to the Office of Management and Budget for a cost analysis.)

OSHA also states that any delay must date from the time the comment period for the request for information closed, March 21, 1992. "The response to the RFI was overwhelming," claims OSHA. "OSHA received over 1200 comments, exceeding 17,000 pages of materials, including a number of complex technical submissions by the close of the comment period. Obviously, it was entitled to a reasonable period of time to study and analyze the information, to seek further information where necessary, and to determine whether the statutory requirements for rulemaking on indoor air quality, including ETS, were satisfied."

OSHA also reminds the court that a new administration took office in January 1993, and that the post of Assistant Secretary remained vacant until the confirmation of Joseph Dear on November 8, 1993. "It is unreasonable to expect that significant priority-setting and resource-allocation decisions concerning the

rulemaking could have been made without the participation of the Assistant Secretary." OSHA argues that the Occupational Safety and Health Act sets no time limits on pre-proposal activities, and grants the Secretary "broad discretion to determine whether to regulate particular hazards at all."

To counter ASH's claims that ETS should be regulated separately from IAQ, OSHA argues that the Secretary has allocated his budget resources to achieve optimum benefit by proposing to regulate IAQ and ETS in the same rulemaking. "Absent exigent circumstances of the most compelling sort, the agency's informed judgment as to the expected benefits of this approach should not be disturbed." OSHA suggests that there is no need for the court to retain jurisdiction over the matter.

VIII. PENDING PETITIONS FILED BY ASH WITH OSHA

- A. "Petition . . . for Rulemaking Banning Smoking in Workplaces," Docket H-122 (RFI Docket), Item 3-991 (filed February 26, 1992). Attached as Exhibit No. 1 is the OSHA ETS standard proposed by ASH.

B. "Petition . . . for Rulemaking Regulating Tobacco Smoke in the Workplace as a Potential Occupational Carcinogen," Docket H-122 (RFI Docket), Item 3-1030 (filed March 10, 1992).

C. Petition for Emergency Temporary Standard, Docket H-030 (ETS docket) (filed July 12, 1993). ASH alleges that since it first petitioned OSHA for an emergency temporary standard on ETS, there is considerably more evidence -- including the EPA Risk Assessment on ETS -- that ETS poses a "serious risk of cancer, heart disease, various respiratory illnesses and other grave dangers to employees."

IX. PETITIONS FILED WITH OSHA BY INDIVIDUALS AND ORGANIZATIONS OTHER THAN ASH

A. September 1985 -- Senator Garn files petition for Mr. David Horne, et al., requesting classification of tobacco smoke as a Category One Potential Occupational Carcinogen. OSHA denied the petition in November 1985.

B. November 1986 -- Representative Monson files a petition for Mr. David Horne requesting an emergency temporary standard governing smoking in the workplace. OSHA denied the petition in February 1987.

- C. May 6, 1987 -- Public Citizen Health Research Group and the American Public Health Association petition OSHA for an emergency temporary standard to prohibit smoking in all indoor workplaces except for certain specified areas. OSHA denied the petition.
- D. March 31, 1992 -- AFL-CIO and other unions petition OSHA to develop an IAQ standard based on a "building systems" approach. OSHA responded in May 1992 by stating that such a standard was under consideration.
- E. June 10, 1992 -- The Coalition on Smoking or Health petitions OSHA to expedite action to protect workers from ETS exposure. By letter dated July 29, 1992, Labor Secretary Martin replies that her department is aware of the "possible adverse health effects" of ETS exposure and is "currently assessing available data."
- F. More than 1,200 comments of various types have been submitted to the OSHA public docket.